

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



75-2111

To be argued by  
ROBERT S. FINK

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Docket No. 75-2111

UNITED STATES OF AMERICA,

vs.

VICTOR DANENZA,

Appellant.

BRIEF FOR APPELLANT

On Appeal from Judgment of Civil Contempt; S. D. N. Y.

KOSTELANETZ, RITHOLZ & MULDERIG

80 Pine Street  
New York, New York  
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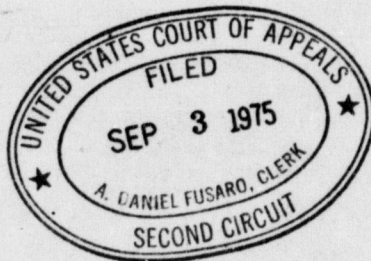


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BRIEF FOR APPELLANT  
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80 Pine Street  
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Issues Presented

1. Whether the District Court lacked jurisdiction to find Appellant guilty of civil contempt for failure to appear before a Grand Jury pursuant to a Grand Jury subpoena when the subpoena was never properly served on Appellant.
2. Whether Appellant was denied due process of law when the District Court denied a request for a hearing at which evidence could be presented and during which



Appellant would have adequate and full cross-examination thereby permitting the Court to have before it the requisite evidence to determine whether or not Appellant's actions were contemptuous.

STATEMENT OF THE CASE

During the period in issue, Appellant was alleged to be a United States citizen, resident at 155 East 55th Street, New York, New York (A.1). On May 1, 1975, a Grand Jury subpoena ad testificandum and duces tecum addressed to Appellant was issued by Raymond F. Burghardt, Clerk of the United States District Court for the Southern District of New York, (A.7)

Pursuant to Title 28, United States Code, §1783\* Mark A. Speiser, Special Attorney, United States Department of Justice, requested an order from United States District Judge Lawrence W. Pierce to permit the government to serve Appellant at a hotel address in Milan, Italy. Judge Pierce ordered pursuant to Rule 17(e)(2) of the Federal Rules of Criminal Procedure and Title 28, United States Code, §1783 that the Grand Jury subpoena be served "directly on said

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\* (a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

VICTOR DANENZA, by the appropriate official of the American Consulate in Rome, Italy, or through the appropriate Italian official in accordance with the requirements of the Italian Law". (A.1-2) In accordance with the requirement of 28 United States Code §1783(b) Judge Pierce further ordered that Appellant "be tended the fare necessary to procure a one way ticket between Milano, Italy and New York, together with \$36 representing one day's witness fee." (A.1-2)

From the affidavit (A.4-6) of Mark A. Speiser, Special Attorney, United States Department of Justice, sworn to June 10, 1975, with exhibits annexed thereto, it appears that an attempt to serve the Grand Jury subpoena was made by giving a copy of the subpoena to Ermes Pilati, the Concierge at the hotel at which Appellant was alleged to be resident. Annexed to the affidavit of Special Attorney Speiser is the affidavit of Luciano Mangiafico. (A.14) Mr. Mangiafico states that he is a vice-consul of the United States Government in Milan, Italy, and that he received a telephone call from Appellant during which



Appellant stated that he had not been served directly with the subpoena. Mr. Mangiafico asked Appellant to appear at the Consulate office so as to enable American officials to directly serve Appellant with another copy of the subpoena. Mr. Danenza declined this request. At no time was Appellant tended air fare, plane tickets, or witness fees. It appears from an unsworn letter dated May 21, 1975 (A.15) which was annexed to Special Attorney Speiser's affidavit that the American Consul wrote a letter to Appellant addressed to a hotel in Milan, Italy stating that the Consulate General was prepared to provide Appellant with a one way ticket from Milan to New York and with \$36 cash per diem. There is no indication as to whether this letter was received by Appellant. Appellant did not appear before the Grand Jury for the United States District Court, Southern District of New York on May 28, 1975, the return date of the subpoena. On June 11, 1975, United States District Judge Edmund L. Palmieri ordered that Victor Danenza appear before the United States District Court on July 1, 1975 and show cause why he should not be held in contempt of this Court for failing to appear before the Grand Jury. Judge Palmieri further directed that his

order be served by personal delivery to Kostelanetz, Ritholz & Mulderig, attorneys for Appellant and by mailing a copy of his order to Appellant to the address where the Grand Jury subpoena was allegedly served. (A.3) On July 1, 1975 Robert S. Fink, a partner in the firm of Kostelanetz, Ritholz & Mulderig, appeared specially before District Judge Robert L. Carter. (It was recently discovered that no transcript exists of this proceeding). It was argued before District Judge Carter that the Court lacked jurisdiction to hold Appellant in contempt due to a failure to properly serve Appellant pursuant to the order of Judge Pierce. The District Court held that it had jurisdiction. A hearing was then requested by Appellant at which hearing evidence could be produced in order to establish that service was not properly completed pursuant to Judge Pierce's order and that Appellant did not have knowledge of the contents of the subpoena or of the requirement for him to appear. The request for a hearing was denied by Judge Carter and without any specific finding of facts Judge Carter held Appellant in civil contempt. On July 29, 1975, Appellant, through his attorneys, Kostelanetz, Ritholz & Mulderig, served and filed a Notice of Appeal appealing to this Court the District Court's order holding Appellant in contempt.



ARGUMENT

Point I

THE DISTRICT COURT LACKED JURISDICTION TO HOLD APPELLANT IN CONTEMPT OF COURT DUE TO THE FAILURE BY THE GOVERNMENT TO DIRECTLY SERVE THE GRAND JURY SUBPOENA AS REQUIRED BY THE ORDER OF JUDGE LAWRENCE W. PIERCE.

Pursuant to Title 28, United States Code §1783, a United States Court may issue an order requiring a United States national or resident, who is present in a foreign country, to appear as a witness before it. Under authority of this section United States District Judge Lawrence W. Pierce issued an order permitting the service of a Grand Jury subpoena in a foreign county. Judge Pierce specifically ordered that the Grand Jury subpoena "be served directly on said Victor Danenza" (emphasis added). The unmistakable meaning of the word "directly" required that the government complete personal service of the subpoena on Appellant. The term "directly" is defined as "in a direct way without anything intervening; not by secondary, but by direct means (citations omitted)". Black, Law Dictionary (4th Ed. 1968). Indirect service by means either of service by mail or service on an intermediary is insufficient and clearly does not comport with the order of Judge Pierce. Counsel for Appellant has been unable to find a single case in which the term "directly" has been interpreted by

the courts in the context of service of a subpoena. However, the contention of Appellant finds additional support in repeated court decisions which state that when the term "directly" is used, no intervening means may be employed. See e.g. Jones v. Maryland, 207 Md. 481 (1955); Weaver v. Landis, 66 Cal. App.2d 34 (1944); State ex rel State Highway Commission v. Borhaf-Duenke Co., 366 S.W.2d 329 (S. Ct. Mo. 1963). Moreover, it is undisputed that the person serving the subpoena did not tender to Appellant the necessary travel and attendance expenses as is required by Title 28, United States Code §1783 and by Judge Pierce's order. It appears once again that the government believes that it can modify both statute and order when inconvenience or other difficulty hampers its actions. It is submitted that by the government's failure to comply with the Court order requiring direct service, no jurisdiction was obtained over the person of Appellant and that therefore the District Court lacked jurisdiction to hold Appellant in contempt.

#### POINT II

IT WAS A DENIAL OF DUE PROCESS OF LAW TO DENY APPELLANT'S REQUEST FOR A HEARING AT WHICH EVIDENCE COULD BE ADDUCED FACTUALLY ESTABLISHING WHETHER OR NOT APPELLANT HAD NOTICE OF THE GRAND JURY SUBPOENA AND KNOWLEDGE OF ITS CONTENTS, AND AS TO WHETHER OR NOT HIS ACTIONS WERE CONTEMPTUOUS.

Since an order of civil contempt may lead to the



physical imprisonment of an individual, the law requires that a higher standard of proof than the ordinary civil standard of "preponderance of the evidence" be present before a court can hold the person guilty of civil contempt. A degree of certainty in proof is required so that there exists no fair ground of doubt. Kansas City Power & Light Co. v. NLRB, 137 F.2d 77, 79 (8th Cir. 1943). This standard of proof in a civil contempt proceeding requires that "the plaintiff has a heavy burden to show a defendant guilty of civil contempt. It must be done by 'clear and convincing evidence', and where there is ground to doubt the wrongfulness of the conduct of the defendant, he should not be adjudged in contempt (citations omitted)". Fox v. Capital Co., 96 F.2d 684, 686 (3rd Cir. 1938). This rule requiring a higher civil standard of proof was adopted by the Second Circuit in Stringfellow v. Haines, 309 F.2d 910 (2nd Cir. 1962). It is respectfully submitted, that as a matter of law, this heavy burden of proof was not and could not be met by the mere submission of the prosecutor's affidavit with annexed exhibits, and that the denial by the District Court of Appellant's requested hearing was tantamount to a denial of due process. By the denial of a hearing Appellant was denied the opportunity to introduce evidence that he had no knowledge of the content of

the Grand Jury subpoena at the time of his required appearance on June 28, 1975. The submission by the prosecutor of an unsworn letter and two affidavits, one of which was translated from the original Italian cannot be evaluated to constitute sufficient evidence upon which an individual may be imprisoned. Although Appellant's liberty is at stake, he was denied the opportunity to cross examine the process server, the vice-consul who allegedly spoke to him, and the American consul who allegedly requested that he appear at the Consulate office in order to receive his air ticket and expenses. Moreover, none of these documents permit a factual finding that Appellant had knowledge that he was required to appear before a Grand Jury in the Southern District of New York on July 28, 1975. Absent such knowledge, Appellant's actions could not be contemptuous. Indeed, the District Court made no specific findings of facts whatsoever as required by Rule 52 of the Federal Rules of Civil Procedure. In In re Sadin, 509 F.2d 1252 (2d Cir. 1975) this court recently held that the procedural safeguards of Rule 42(b) of the Federal Rules of Criminal Procedure are required to be followed in a civil contempt proceeding. The rationale of the Sadin case was again espoused by this court in In re Di Bella, F.2d (2d Cir. 1975; Slip. Op. #993, 7/8/75), wherein this court held that a recalcitrant grand jury witness was legally entitled to the assistance of counsel. In discussing the civil contempt proceeding the Court stated at page 4670

"Admittedly, such a proceeding is basically civil in nature. The



purpose of holding a witness in contempt is to coerce him to answer the grand jury's questions, not to punish him for reprehensible conduct. In Re Persico, 491 F.2d 1156 (2d Cir. 1974). Yet, the burden of imprisonment is just as great, regardless of what we call the order that imposed it. It is this fact that fosters the need for procedural protection."

As such, the District Court's denial of Appellant's request for a formal hearing denied Appellant the procedural regularities described by Rule 42(b) of the Federal Rules of Criminal Procedure and of the safeguards provided in the Sadin and Di Bella decisions. The fact that these contempt proceedings have been labeled civil does not act to deprive Appellant of his constitutional guarantee of due process. United States v. Alter, 482 F.2d 1016 (9th Cir. 1973). Accordingly, even if this Court should find that the District Court had jurisdiction of the person of Appellant, it should reverse the judgment of contempt and remand the case to the District Court with instructions to conduct a factual hearing at which Appellee shall have the burden of proving by clear and convincing evidence that Appellant knowingly disobeyed a Grand Jury subpoena and that such actions were contemptuous.

#### CONCLUSION

This Court should reverse the judgment entered below for the reason stated in Point I hereof. Should the

Court decline to reverse the judgment on that ground, the Court should, in the alternative, remand these proceedings to the District Court with instructions that the District Court conduct a hearing as requested in Point II.

Respectfully Submitted,

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